Nos. 89-1838, 89-1845

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALI BOURESLAN and
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioners,

v.

ARABIAN AMERICAN OIL COMPANY and
ARAMCO SERVICES COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

GARY B. BORN
Counsel of Record
W. HARDY CALLCOTT
MICHAEL C. SMALL
ELIZABETH KIINGI
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ROBERT F. MULLEN
Co-Chairman
DAVID S. TATEL
Co-Chairman
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
Lawyers' Committee for Civil Rights Under Law
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits employment discrimination outside the United States by a U.S. corporation against a U.S. citizen.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	6
I. CONGRESS EXPRESSLY EXTENDED THE GEOGRAPHIC REACH OF TITLE VII TO THE LIMITS OF FEDERAL POWER UNDER THE CONSTITUTION	6
A. The Plain Language of Title VII Extends the Act's Geographic Scope to the Limits of Federal Power Under the Constitution	7
B. The Legislative History of Title VII Demonstrates That the Act's Geographic Scope Extends to the Limits of Federal Power Under the Constitution	9
C. Title VII Expresses a Fundamental National Moral Commitment That is Applicable to U.S. Nationals Outside U.S. Territory	12
II. EVEN IF THE GEOGRAPHIC SCOPE OF TITLE VII WERE AMBIGUOUS, IT WAS ENACTED AGAINST THE BACKGROUND OF INTERNATIONAL CHOICE-OF-LAW PRINCIPLES THAT PERMIT THE EXTRATERRITORIAL APPLICATION OF U.S. LAWS	14
A. This Court Has Repeatedly Refused to Adopt Any Rigid Presumption That Federal Law Applies Only Within U.S. Territory	14

TABLE OF CONTENTS—Continued

Page

B. Rather Than Applying Any Rigid Presumption of Territoriality, This Court Has Repeatedly Held That the Reach of Ambiguous Federal Statutes Is Determined By Reference to International Choice-of-Law Principles 22

III. UNDER INTERNATIONAL CHOICE-OF-LAW PRINCIPLES, TITLE VII APPLIES TO EMPLOYMENT DISCRIMINATION OUTSIDE THE UNITED STATES BY A U.S. COMPANY AGAINST A U.S. CITIZEN 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) 11

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) 4, 15, 16, 19

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) 26

Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963) 26

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2d Cir. 1959) 23

Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) 11, 21

Blackmer v. United States, 284 U.S. 421 (1932) 15, 26

Blum v. Stenson, 465 U.S. 886 (1984) 7

Bob Jones University v. United States, 461 U.S. 574 (1983) 13

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 15

CFTC v. Nahas, 738 F.2d 487 (D.C. Cir. 1984) 8

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962) 4, 19

Cook v. Tait, 265 U.S. 47 (1924) 26

Daniel v. Paul, 395 U.S. 298 (1969) 10

FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300 (D.C. Cir. 1980) 8

Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981) 29

Fogleman v. Aramco, 623 F. Supp. 908 (W.D. La. 1985) 9

Foley Brothers, Inc. v. Filardo, 336 U.S. 281 (1949) 11, 15, 16, 21

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 3, 13

Grunenthal GmbH v. Hotz, 712 F.2d 421 (9th Cir. 1983) 20

Hamm v. City of Rock Hill, 379 U.S. 306 (1964) 13

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 10

TABLE OF AUTHORITIES—Continued

	Page
Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984)	11
Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970)	23
Hilton v. Guyot, 159 U.S. 113 (1895)	16
Home Insurance Co. v. Dick, 281 U.S. 397 (1930)	11
Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970)	29
International Longshoremen's Association, Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970)	21
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	16
Katzenbach v. McClung, 379 U.S. 294 (1964)	10
Kern v. Dynalectron Corp., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984)	29
Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984)	28
Lauritzen v. Larsen, 345 U.S. 571 (1953)	5, 22, 25, 26, 28
Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3rd Cir. 1979)	24
McCulloch v. Sociedad Nacional de Marineros, 372 U.S. 10 (1963)	11, 16, 21
McGee v. International Life Insurance Co., 355 U.S. 220 (1957)	26
Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982)	24
Montship Lines, Ltd. v. Federal Maritime Board, 295 F.2d 147 (D.C. Cir. 1961)	8
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North Carolina Department of Transportation v. Crest Street Community Council, 479 U.S. 6 (1986)	8
Park 'N Fly v. Dollar Park and Fly, Inc., 469 U.S. 189 (1985)	7
Pennoyer v. Neff, 95 U.S. 714 (1878)	16

TABLE OF AUTHORITIES—Continued

	Page
Polish National Alliance v. NLRB, 322 U.S. 643 (1944)	3, 11
Psimenos v. E.F. Hutton & Co., 722 F.2d 1041 (2d Cir. 1983)	20
Ramirez & Feraud Chili Co. v. Las Palmas Food Co., 146 F. Supp. 594 (S.D. Cal. 1956), *aff'd*, 245 F.2d 874 (9th Cir. 1957)	24
Randall v. Aramco, 778 F.2d 1146 (5th Cir. 1985)	9
Romero v. International Terminal Operating Co., 358 U.S. 354 (1959)	23
Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812)	16
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985)	15
Skiriotes v. Florida, 313 U.S. 69 (1941)	25
Societe Internationale Pour Participations Industrielles et Comerciales, S.A. v. Rogers, 357 U.S. 197 (1958)	20, 27, 29
Societe Nationale Industrielle Aerospatiale v. U.S. District Court, 482 U.S. 522 (1987)	*passim*
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Steele v. Bulova Watch Co., 344 U.S. 280 (1952)	*passim*
Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982)	18
Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966)	23
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TABLE OF AUTHORITIES—Continued

	Page
United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)	5, 19, 24, 25
United States v. Baker, 609 F.2d 134 (5th Cir. 1980)	20
United States v. Bowman, 260 U.S. 94 (1922)	26, 28
United States v. Brown, 549 F.2d 954 (4th Cir. 1977)	20
United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968)	8
United States v. Locke, 471 U.S. 84 (1985)	7
United States v. Menasch, 348 U.S. 528 (1955)	7
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Wickard v. Filburn, 317 U.S. 111 (1942)	9, 10
W.S. Kirkpatrick v. Environmental Tectonics Corp., 110 S. Ct. 701 (1990)	19
Zenith Radio Corp. v. Hazeltine Research Corp., 395 U.S. 100 (1969)	19
Zoelsch v. Arthur Andersen & Co., 824 F.2d 27 (D.C. Cir. 1987)	20

STATUTES AND LEGISLATIVE MATERIALS

15 U.S.C. § 1	19
15 U.S.C. § 2	19
15 U.S.C. § 77b(7)	20
46 U.S.C. App. § 688(a)	22
50 U.S.C. App. § 451	26
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	Page
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Foreign Assistance Act of 1962 (The Hickenlooper Amendment), 22 U.S.C. § 2370(e)	17
Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a)	17, 26
Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611	17
Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3)	17
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TABLE OF AUTHORITIES—Continued

	Page
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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This amicus curiae brief is submitted in support of petitioners, Ali Boureslan and the Equal Employment Opportunity Commission. By letters filed with the Clerk of the Court, petitioners and respondents have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar throughout the country in the national effort to ensure civil rights to all Americans. As part of this effort, the Lawyers' Committee has represented parties and participated as an *amicus* in several Title VII cases before this Court.

This case raises important issues concerning the geographic scope of the application of Title VII that may affect employment discrimination litigation in which the Lawyers' Committee will participate. The significance of these issues is magnified by the increasingly international character of U.S. industry and employment opportunities. The Lawyers' Committee has a long-standing interest in persuading the Court to adopt principles that will result in the sound administration of Title VII. Finally, leading members of the bar associated with the Lawyers' Committee played a role in the legislative process culminating in the enactment of Title VII, and therefore, are uniquely competent to offer views regarding the principles and history associated with the legislation.

SUMMARY OF ARGUMENT

The question presented in this case is whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination outside the United States by a U.S. corporation against a U.S. citizen. The Court of Appeals held that it does not. The court reasoned that a federal statute is not ~~applic~~able extraterritorially to conduct occurring outside the United States absent clear statutory language dictating such a result, and that Title VII contains no such language.

I.

The Court of Appeals erred by substituting a judicially-created presumption for Congress' plain words and manifest intent. Title VII declares a fundamental national commitment to eradicate racial, religious, gender, and other forms of discrimination in employment. Consistent with this high objective, Congress and the President made Title VII broadly applicable to the limits of federal power: the Act extends to employment discrimination by all employers whose enterprises "affect" commerce "among the several states; or between a State and any place outside thereof." 42 U.S.C. § 2000e(g). Thus, by its plain terms, Title VII reaches *all* discriminatory acts—wherever they may occur—by those employers who affect comerce.

Moreover, the legislative history of the Civil Rights Act of 1964 shows that Congress intended the Act's anti-discrimination provisions to reach to the full extent permitted by the Constitution. Title VII's legislative history states specifically that the Act extends to "that commerce to which the regulatory power of Congress extends." 110 Cong. Rec. 7212 (1964). Similarly, in discussing Title VII's definition of "commerce," the Act's drafters repeatedly cited *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944), in which this Court characterized a similar statute as Congress' effort "to regulate all conduct having such consequences that constitutionally it can regulate."

It was only natural that Congress wanted the geographic scope of Title VII to extend to the limits of the Constitution. Title VII states the fundamental moral commitment of this Nation—as a matter of "highest priority," *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976)—to eradicate employment discrimination. Similarly, the Act's legislative history evinces a profound concern for the effect of employment discrimination upon U.S. international relations. As President Kennedy told the United Nations when describing a bill that would become Title VII: "The United States of America is opposed to discrimination and persecution on grounds of race and religion *anywhere in the world.*"

II.

Even if we put to one side the plain language and manifest intent of Title VII, the Court of Appeals erred in adopting a rigid presumption that federal law applies only within U.S. territory. This presumption of territoriality was derived from 18th and 19th century public international law principles, as well as from the assumption that Congress is not concerned with international matters. Neither generalization retains vitality in today's interdependent global economy.

First, it is no longer true that Congress is concerned only with domestic matters. During this century, bur-

geoning transnational business activities and increasing economic interdependence have demanded sustained federal legislative attention. "In today's highly integrated world economy, international economic policy issues are inseparably intertwined with domestic policy issues." *The Annual Report of the Council of Economic Advisers*, 264 (Feb. 1990). As a consequence, Congress has repeatedly concerned itself with international matters, enacting scores of major statutes that regulate transnational and foreign conduct. And other developed nations have done the same.

Second, this century has witnessed profound changes in public international law. During the 18th and 19th centuries, international law was generally understood as erecting strict territorial limits to national jurisdiction. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). But contemporary authorities, including the Restatement (Third) Foreign Relations Law, make it clear that territoriality is not the sole legitimate basis for national jurisdiction under international law.

This Court's decisions illustrate the extent to which archaic notions of strict territoriality have been abandoned. Without any specific statutory instruction to apply the Sherman Act and other antitrust laws extraterritorially, this Court has repeatedly done so in recent decades. *E.g., Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Indeed, the Court has expressly overruled its earlier decision in *American Banana*, where a presumption of territoriality was invoked to hold the antitrust laws applicable only to conduct within the United States. Similarly, the Lanham Act has been applied extraterritorially by this Court, notwithstanding the absence of any language specifically requiring such a result. *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952). Finally, again without a specific statutory mandate, it is clear that the federal securities laws apply to conduct that takes place wholly outside the United States. *See* Restatement (Third) Foreign Relations Law § 416 (1987) (citing authorities).

Rather than reflecting any strict presumption of territoriality, this Court's decisions are instead based upon the more natural conclusion that Congress legislates against the background of international choice-of-law principles, and that it is these principles that should inform the construction of federal statutes. Thus, in *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953), the Court interpreted the Jones Act's broad jurisdictional grant in light of historic "choice of law" rules. The same approach was taken in other leading international decisions, including *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987), and *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945).

In light of these cases, the recent Restatement (Third) of Foreign Relations Law (1987) specifically *deleted* a provision, set forth in § 38 of the Restatement (Second) of Foreign Relations Law (1965), stating that federal statutes were presumed to apply only within U.S. territory. In its place, the Third Restatement provides that a "rule of reason," based upon this Court's international choice-of-law rules, establishes the appropriate reach of federal legislation. Restatement (Third) Foreign Relations Law §§ 402 comment i, 403 comment a (1987).

III.

Under the international choice-of-law decisions of this Court, it is plain that Title VII applies to respondents' alleged misconduct. Respondents, Delaware corporations, are concededly U.S. nationals. This Court has long recognized that nationality is a wholly legitimate basis for the extraterritorial application of U.S. laws. U.S. statutes dealing with a wide range of subjects expressly apply to U.S. nationals wherever they may be, and nationality has been a vital factor in this Court's decisions determining the reach of other federal statutes. Moreover, the petitioner in this case is a U.S. national. Numerous decisions of this and other courts affirm the legitimate

interest of a State in providing effective legal relief for its citizens, even when they are abroad.

Employment discrimination abroad by major companies (like respondents) will also have substantial effects within the United States. More than 2 million Americans work abroad, and advancement in many major U.S. companies depends increasingly upon successful performance in overseas assignments. Denying U.S. citizens the protections of Title VII during such assignments will affect their ability to rise to positions of responsibilities here in the United States. And the tolerance of race or sex discrimination in overseas operations of a U.S. company can invidiously affect domestic attitudes.

Finally, Title VII expresses a U.S. policy—eliminating employment discrimination—to which Congress attached the "highest priority." No showing has been made that Saudi Arabian law conflicts with that policy in this case, either by requiring or encouraging private bias. Given Title VII's alien exclusion, as well as the broad international consensus against discrimination, such conflicts are unlikely to arise with any frequency. And if they do, international choice-of-law rules could take such conflicts into account and might in some cases provide some defense to Title VII violations. But this case presents no such conflict.

ARGUMENT

I. CONGRESS EXPRESSLY EXTENDED THE GEOGRAPHIC REACH OF TITLE VII TO THE LIMITS OF FEDERAL POWER UNDER THE CONSTITUTION

The plain language and legislative history of Title VII extend the protections of the Act to U.S. citizens whether or not they are within U.S. territory. The Court of Appeals ignored Congress' words and intent, choosing instead to give effect to a judicially-created presumption that federal statutes apply only within the United States. In so doing, the lower court abandoned its proper task

of ascertaining legislative intent.[1] And it violated this Court's admonition that statutory interpretation is primarily concerned with the statute's plain language.[2]

A. The Plain Language of Title VII Extends the Act's Geographic Scope to the Limits of Federal Power Under the Constitution

Title VII makes it unlawful for an "employer" to discriminate based on race, religion, sex, or national origin. 42 U.S.C. § 2000e-2. "Employer" is defined as "a person engaged in an industry affecting commerce" who has fifteen or more employees. 42 U.S.C. § 2000e(b). "Commerce" is, in turn, defined as trade "among the several States; *or between a State and any place outside thereof.*" 42 U.S.C. § 2000e(g) (emphasis supplied). By their plain terms, these provisions of Title VII extend to employment discrimination anywhere in the world by any fifteen-person employer who "affect[s]" trade "between a State and any place outside thereof."[3]

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[1] *See United States v. Albertini*, 472 U.S. 675, 680 (1985); *United States v. Locke*, 471 U.S. 84, 95-96 (1985); pp. 14-15 *infra*.

[2] *See, e.g., Park'N Fly v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose"); *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("Where, as here, resolution of a question of federal law turns on a statute and the intent of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear"); *cf. University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 583 (1990) (relying on plain language of Title VII).

[3] The term "State" is defined expansively in 42 U.S.C. § 2000e(i) to include all possessions of the U.S. The "between a State and any place outside thereof" clause in the definition of "commerce" can only apply to commerce between the U.S. and other countries, because there is no place within the U.S. that is not also within a State, as defined in Title VII. Respondents' reading of the statute would render the "between a State and any place outside thereof" clause in § 2000e(g) superfluous, contrary to familiar principles of statutory construction. *See United States v. Menasch*, 348 U.S. 528, 538-39 (1955) (court must "give effect, if possible, to every clause and word of a statute").

Nothing in Title VII even remotely suggests any exemption or immunity for unlawful discrimination by employers against U.S. nationals outside of U.S. territory. On the contrary, § 2000e-1 exempts from the statute "an employer with respect to the employment of aliens outside any State[.]" Unless Title VII was generally intended to have extraterritorial application, there would have been no reason to specifically exclude aliens from its protections when they are abroad.[4]

[4] The Court of Appeals found Title VII "curiously silent" on questions such as subpoenas for overseas violations, venue for overseas violations, and conflicts with foreign laws. U.S. Cert. Pet. 5a. Even if such purported anomalies existed, it is improper to "ignore the plain language of a statute to avoid a possibly anomalous result": "[t]he short answer is that Congress did not write the statute that way." *North Carolina Dep't of Transp. v. Crest Street Community Council*, 479 U.S. 6, 14 (1986) (quoting *Garcia v. United States*, 469 U.S. 70, 79 (1984)). In any event, the anomalies cited by the lower courts do not exist.

Section 2000e-9 provides the EEOC with the investigatory and subpoena authority enjoyed by the National Labor Relations Board. Under § 161(2) a subpoena can be served within the United States on a U.S. or other company wherever it may be found—which at a minimum encompasses where its offices may be located. Although served in the United States, that subpoena can demand documents and other materials located outside U.S. territory. *See United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968); *Montship Lines, Ltd. v. Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961); Restatement (Third) Foreign Relations Law § 442 (1987). Under § 161(5) an EEOC subpoena likely may not be *served* outside the United States, but given the preceding authorities this is not an obstacle to effective investigations. Moreover, other agencies that enforce statutes that are clearly applicable extraterritorially have long operated with the same constraint, which is derived from international law concerns about serving compulsory process within foreign territory. *See Commodity Futures Trading Commission v. Nahas*, 738 F.2d 487 (D.C. Cir. 1984); *FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300 (D.C. Cir. 1980).

Section 2000e-5(f)(3) provides a host of venue choices, including the judicial district where employment records are located and where a respondent's "principal office" is located. In virtually all cases, employers subject to Title VII will have their principal corporate office in the United States. And in those few cases where

B. The Legislative History of Title VII Demonstrates That the Act's Geographic Scope Extends to the Limits of Federal Power Under the Constitution

The legislative history of Title VII compels the same conclusion as the language of the statute: Congress intended to eradicate discrimination to the full geographic extent of its power over both domestic and foreign commerce under the Constitution. An interpretive memorandum read into the Congressional Record by the floor managers of Title VII in the Senate stated exactly this:

> Title VII covers discriminatory practices by employers engaged in industries affecting commerce, as defined in the title . . . . [*Commerce*] *is, in short, that commerce to which the regulatory power of Congress extends*[.] [5]

Both proponents and opponents of Title VII in the House Judiciary Committee cited *Wickard v. Filburn*, 317 U.S. 111 (1942), as defining the scope of the bill.[6] *Wick-*

an employer's corporate headquarters is abroad, the Act's reference to "principal office" is sufficiently flexible to include the employer's principal office in the U.S. *Cf. Randall v. Aramco*, 778 F.2d 1146, 1148 (5th Cir. 1985); *Fogleman v. Aramco*, 623 F. Supp. 908, 910 (W.D. La. 1985); 1 Moore's Federal Practice ¶ 0.77[2.-3], at 717.47-.48 (2d ed. 1990).

Finally, even if Title VII contained no specific provisions dealing with conflicts between the Act and foreign law, that is because this Court has long resolved such conflicts based on international choice-of-law principles. See pp. 22-25 *infra*. There are, for example, no provisions of the Sherman Act, the Lanham Act, the Jones Act or the federal securities laws covering conflicts with foreign law—yet it is clear that all these laws apply extraterritorially. In any event, the alien exclusion was specifically included in the Act to avoid conflicts with foreign laws. H.R. Rep. No. 570, 88th Cong., 1st Sess. 4 (1963) (purpose of exemption is to "remove conflicts of law" between Title VII and foreign law).

[5] 110 *Cong. Record* 7212 (1964) (emphasis supplied), *reprinted in* EEOC, *Legislative History of Titles VII and XI of Civil Rights Act of 1964* 3039, 3041 (hereinafter, "EEOC Legislative History").

[6] *See* H.R. Rep. No. 914, 88th Cong., 1st Sess. at 108 (1963) (Views of Reps. Poff and Cramer), *reprinted in* EEOC Legislative History at 2108; *id.* Part II at 13 (Views of Rep. McCulloch et

ard was clearly understood then—as it is now—as upholding a statutory scheme that was as broad as Congress could enact under the Commerce Clause.[7] And finally, this Court has read the definition of "commerce" in Title II of the 1964 Civil Rights Act, which is parallel to the definition in Title VII,[8] to include all commerce Congress can constitutionally regulate.[9]

Moreover, Title VII's supporters relied on Congress' authority to regulate both interstate and *foreign* commerce. For example, Senator Clark cited the opinion of U.S. Deputy Attorney General Katzenbach relying on Congress' power over foreign commerce.[10] Senator Clark also cited an opinion of the Lawyers' Committee concluding that "[e]mployers, employment agencies as well as labor

al.), *reprinted in* EEOC Legislative History at 2134. The proponents cited *Wickard* to demonstrate the constitutionality of the bill; the opponents cited the case in an attempt to prove that the coverage of the legislation would be too broad as a policy matter.

[7] *Wickard* upheld as consistent with the Commerce Clause a penalty against a wheat farmer for grain grown for his own use. The Court extensively discussed the international nature of the market for wheat, and relied upon Congress' power to regulate both interstate commerce and foreign commerce to uphold the statutory scheme at issue. *Wickard*, 317 U.S. at 125-26.

[8] A memorandum written by the Lawyers' Committee and read into the Congressional Record by the floor managers of the Act specifically analogized the scope of "commerce" for the purposes of Title II and Title VII, stating: "[t]he same considerations which support the conclusion that the public accommodations title [Title II] is valid under the commerce clause . . . are equally applicable here [to Title VII]." 110 *Cong. Rec.* 7208 (1964), *reprinted in* EEOC Legislative History at 3077.

[9] *See Daniel v. Paul*, 395 U.S. 298 (1969); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

[10] 110 *Cong. Rec.* 7209 (1964), *reprinted in* EEOC Legislative History at 3078 ("We believe that the commerce clause of the Constitution (art. I, sec. 8) provides authority for Congress to enact fair employment practices legislation. The courts have repeatedly upheld the power of Congress to regulate employment relations affecting interstate *and foreign* commerce") (emphasis supplied).

organizations whose business or activities affect interstate *or foreign* commerce are clearly subject to congressional legislative authority."[11] And finally, the Katzenbach opinion, and other materials, relied specifically upon *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944). There, this Court held that Congress, by adopting a definition of commerce identical to that in Title VII, "has undertaken to regulate all conduct having such consequences that constitutionally it can regulate."[12]

Future cases may involve employers and employees whose activities have so little relation with this country that the Constitution would preclude application of Title VII by a U.S. court.[13] But respondents properly concede that Congress could constitutionally reach their conduct,

[11] *Id., reprinted in* EEOC Legislative History at 3077 (emphasis supplied). Similarly, Representative Cellar said: "Title VII covers employers engaged in industries affecting commerce, that is to say, interstate *and foreign* commerce." 110 *Cong. Record* 1511 (1964), *reprinted in* EEOC Legislative History at 3091 (emphasis supplied). The Senate bill (which ultimately became law) omitted the preamble to the House bill, which had specifically stated that it was intended "To remove obstructions to the free flow of commerce among the States and with foreign nations." But this deletion is irrelevant; the debate cited above demonstrates that the Senate, like the House, was relying on power over foreign commerce when it passed Title VII, and the Senate accordingly expected that Title VII would in fact affect foreign commerce.

[12] And all of the opinions discussed above cited *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937), where this Court interpreted a definition of commerce identical to that in Title VII as reaching both "interstate and foreign" commerce. By contrast, we have been unable to locate anywhere in the voluminous legislative history of Title VII any citation to the three cases principally relied upon by Aramco in the court below—*Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); *McCulloch v. Sociedad Nacional de Marieneros*, 372 U.S. 10 (1963), or *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957).

[13] The Due Process Clause could limit either legislative jurisdiction, *see Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), or personal jurisdiction, *see Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984).

Cert. Opp. at 20-23, and that should be the end of the matter.

C. Title VII Expresses a Fundamental National Moral Commitment That is Applicable to U.S. Nationals Outside U.S. Territory

It is only natural that Title VII's geographic scope extend to the full limits of federal power under the Constitution. Congress and the President emphatically said that Title VII was a fundamental moral commitment by this Nation of the highest order, and they repeatedly linked the high goals of Title VII to the international standing and relations of the United States. It would be wholly implausible to conclude that they did not want an overriding commitment of this character to extend to the full limits of federal authority.

In enacting Title VII, Congress explicitly declared its intent to resolve a pressing moral wrong:

> [T]his ~~bill~~ can and will commit our nation to the elimination of many of the worst manifestations of racial prejudice. This is of paramount importance and is long overdue. The practices of American democracy must conform to the spirit which motivated the Founding Fathers of this Nation—the ideals of freedom, democracy, justice and opportunity. The entire Nation must meet this challenge, and it must do so now.[14]

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[14] H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, at 2 (1963), *reprinted in* EEOC Legislative History at 2122. (views of Rep. McCulloch). As Representative McCulloch eloquently stated:

> [W]e believe in the creation of job equality because it is the right thing to do. We believe in the inherent dignity of man. He is born with certain inalienable rights. His uniqueness is such that we refuse to treat him as if his rights and well-being are bargainable. All vestiges of inequality based solely on race must be removed in order to preserve our democratic society, to maintain our country's leadership and to enhance mankind.

Id. at 30, *reprinted in* EEOC Legislative History at 2151.

President Kennedy, discussing the bill that became Title VII, struck the same theme in his final address to the United Nations.[15] And this Court has observed how Congress "ordained that its policy of outlawing [employployment] discrimination should have the 'highest priority' " [16]

Finally, unlike ordinary labor legislation, concerns about the international consequences of employment discrimination were a fundamental reason for enactment of Title VII. When he first proposed the bill, President Kennedy cited "the discriminatory treatment suffered by too many foreign diplomats, students and visitors to this country." [17] And he later emphasized that the Nation's racial injustices undermined our worldwide efforts to advance the cause of freedom.[18] Similarly, the House reports on the 1964 Civil Rights Act urged that the bill was necessary to combat

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[15] *See* "Address Before the 18th General Assembly of the United Nations," *Pub. Papers* 697 (Sept. 20, 1963) ("I hope that not only our Nation but other multiracial societies will meet these standards of fairness and justice"). As this Court has noted, the Executive Branch has consistently demonstrated its commitment to "the fundamental policy of eliminating racial discrimination." *Bob Jones University v. United States*, 461 U.S. 574, 595 (1983).

[16] *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (citations omitted) (*quoting Newman v. Piggie Park Enterps., Inc.*, 390 U.S. 400, 402 (1968)). *See Hamm v. City of Rock Hill*, 379 U.S. 306, 317 (1964) ("Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and declared that the public policy of our country is to prohibit discrimination").

[17] "Special Message to the Congress on Civil Rights," *Pub. Papers* 230 (Feb. 28, 1963). President Kennedy went on to say "But it is not enough to treat those from other lands with equality and dignity—the same treatment must be afforded to every American citizen." *Id.*

[18] "Radio and Television Report to the American People on Civil Rights," *Pub. Papers* 469 (June 11, 1963) ("We preach freedom around the world, and we mean it, and we cherish our freedom here at home, but are we to say to the world, and much more importantly, to each other that this is a land of the free, except for the Negroes . . .?"); *see generally* C. Brauer, *John F. Kennedy and the Second Reconstruction* 276-78 (1977); Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988).

totalitarian regimes abroad,[19] as well as to preserve the global competitive position of the U.S. and present an example to newly-emerging nations.[20]

II. EVEN IF THE GEOGRAPHIC SCOPE OF TITLE VII WERE AMBIGUOUS, IT WAS ENACTED AGAINST THE BACKGROUND OF INTERNATIONAL CHOICE-OF-LAW PRINCIPLES THAT PERMIT THE EXTRATERRITORIAL APPLICATION OF U.S. LAWS

A. This Court Has Repeatedly Refused to Adopt Any Rigid Presumption That Federal Law Applies Only Within U.S. Territory

Quite apart from its misreading of the plain language and manifest intent of Title VII, the Court of Appeals erred in adopting a rigid "presumption against extraterritorial application of a [federal] statute." U.S. Cert. Pet. at 2a. This Court has long recognized that presumptions and other principles of statutory construction are not rules of law, but are instead common-sense guides to ascertaining what Congress likely intended. As Chief Justice Rehnquist has explained:

> Generalities about statutory construction help us little. They are not rules of law but merely axioms

[19] *See* H.R. Rep. No. 914, 88th Cong., 1st Sess., Pt. 2, at 17 (1963) *reprinted in* EEOC Legislative History at 2128 ("Our Nation is engaged today in cold war combat with an alien ideology. On every front—military, economic, political, and social—we must demonstrate the worth of our system").

[20] *See* H.R. Rep. No. 1370, 87th Cong., 2d Sess. at 3 (1962), *reprinted in* EEOC Legislative History at 2157 ("In addition to creating unfavorable impressions among the free peoples of the world, employment discrimination . . . poses a distinct threat to the Nation's ability to maintain its competitive position in the world"); *see also id.* at 2, EEOC Legislative History at 2156 ("Among other peoples of the free world, especially the peoples of the newly emerging and uncommitted nations, continued employment discrimination in the United States casts doubt upon our sincerity in furthering the cause of individual liberty and human dignity").

> of experience. They do not solve the special difficulties in construing a particular statute. The variables render every problem of statutory construction unique.[21]

Or, as this Court has said about a related principle of statutory construction: "this interpretive canon is not a license for the judiciary to rewrite language enacted by the legislature." [22]

The lower court's presumption of territoriality is largely the product of dicta in a few early decisions by this Court that have long since been superseded. One of the earliest and most direct statements of this presumption was in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909), where the Sherman Act was held inapplicable to the actions of a U.S. company in Central America because of "the general and almost universal rule . . . that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." Similarly, in *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (citing *American Banana*), the Court observed in passing that "the legislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States." And lastly, in *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 295 (1949), this dicta was referred to as a "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."

[21] *Weinberger v. Rossi*, 456 U.S. 25, 28 (1982) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

[22] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493 n.11 (1985) (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985)). "Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *United States v. Albertini*, 472 U.S. 675, 680 (1985). *See also Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986) (a presumption is controlling only "where substantial doubt about the congressional intent exists").

This presumption of territoriality was a common-sense generalization about Congress' likely intent that derived from two sources. First, under 18th and 19th century principles of public international law, the extraterritorial application of U.S. law "would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *American Banana*, 213 U.S. at 356.[23] As *American Banana* illustrates, the overwhelming weight of 19th century authority held that public international law erected strict territorial limits to national jurisdiction.[24]

Second, the presumption of territoriality was linked, in one decision, to Congress' likely lack of concern about events occurring abroad. The presumption was said to be based on "the assumption that Congress is primarily concerned with domestic conditions," *Foley Bros.*, 336 U.S. at 285, and that Congress would probably not have meant to deal with foreign or international conditions unless it said so explicitly.

Both of these bases of the territoriality presumption have lost their vitality. This century has witnessed a

[23] This Court's presumption of territoriality was one reflection of the general notion that Congress would not likely intend to violate rules of public international law. *See The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963).

[24] *Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812); *The Apollon*, 22 U.S. (9 Wheat.) 361, 370 (1924); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895), ("[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived"). Similarly, in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878), this Court said that under international law "no State can exercise direct jurisdiction and authority over persons and property without its territory." The Court relied upon a number of international commentators for this conclusion, including J. Story, *Commentaries on the Conflict of Laws* § 539 (7th ed. 1872); H. Wheaton, *Elements of International Law* §§ 77, 111-14, 134-51 (1866). Like *American Banana*'s limits on legislative jurisdiction, *Pennoyer*'s rigid territorial limitations on judicial jurisdiction have long since been abandoned. *See International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

dramatic and exponential growth in transnational trade and international commercial interdependence.[25] As the Council of Economic Advisers recently observed, "[i]n today's highly integrated world economy, international economic policy issues are inseparably intertwined with domestic policy issues. International features arise naturally as one considers traditionally domestic issues such as fiscal policy, monetary policy, and environmental policy." [26]

As a result, the United States and other nations have increasingly taken great regulatory interest in conduct occurring abroad and have frequently extended their laws extraterritorially to such conduct. Thus, Congress has enacted scores of federal laws that deal with countless issues occurring partially or wholly outside of the United States.[27] Simply, put, the economic, social, and political

[25] *Compare* Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 1947*, Table No. 992, at 887 (68th ed. 1947) (average annual U.S. exports and imports in 1936-40 of $3.2 billion and $2.5 billion) *with* Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 1987*, Table No. 1401, at 789 (107th ed. 1986) (annual U.S. exports and imports in 1985 of $213 billion and $345 billion). *See Economic Report of the President* 7 (Feb. 1990) ("The 1980's have underscored the increased importance of global economic events in shaping our lives"); U.S. Dep't of Commerce, *United States Trade: Performance in 1988* 1-6 (1989) (emphasizing "growing international interdependence of nations").

[26] *The Annual Report of the Council of Economic Advisers* 264 (Feb. 1990).

[27] *E.g.*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11; Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6a, 45(a)(3); Federal Reserve Act of 1913, 12 U.S.C. §§ 601-604a; Foreign Assistance Act of 1962 (The Hickenlooper Amendment), 22 U.S.C. § 2370(e); Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1(a). A 1989 compilation of U.S. international trade legislation is 898 pages long and includes hundreds of statutory provisions. Committee on Ways and Means, U.S. House of Representatives, *Overview and Compilation of U.S. Trade Statutes* (1989). Other nations have also increasingly applied their laws extraterritorially. *See* Restatement (Third) Foreign Relations Law, § 403, Reporters' Note 3 (1987).

interdependence of the 20th century world does not permit Congress to concern itself solely with "domestic conditions," and it no longer makes sense to assume that any such limitation is intended.

At the same time, principles of public international law have significantly evolved to accommodate these extraterritorial regulatory measures. A wide range of authorities attest to the abandonment of notions of strict territoriality. Thus, the Restatement (Third) Foreign Relations Law provides that jurisdiction may be based upon nationality, *id.* § 402(2), upon the "effects" or objective territoriality principle, *id.* § 402(1)(c), upon so-called "universal" offenses, *id.* § 404, or upon the protective principle, *id.* § 402(3). Indeed, the Third Restatement specifically describes the gradual erosion of strict public international law notions of territoriality:

> In the past, the jurisdiction of a state to make its law applicable in a transnational context was determined by formal criteria supposedly derived from concepts of state sovereignty and power. . . . Increasingly, the practice of states has reflected conceptions better adapted to the complexities of contemporary international intercourse. . . . Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria.[28]

This Court's decisions illustrate both the degree to which Congress has concerned itself with conduct abroad

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[28] Restatement (Third) Foreign Relations Law, at 235-37 (1987). Other authorities describe the same process. *See* Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 Recueil des Cours 321 (1979); D. Rosenthal & B. Knighton, *National Laws and International Commerce* (1982); Akehurst, *Jurisdicton in International Law*, 46 Brit. Y.B. Int'l L. 145 (1974); Wallace, *Extraterritorial Jurisdiction*, 15 Law & Pol'y Int'l Bus. 1099 (1983). *Cf. Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 186 (1982) ("As corporate involvement in international trade expanded in this century, old commercial treaties became outmoded").

and the extent to which 18th century notions of strict territoriality have been abandoned. In enacting the antitrust laws, Congress used only general language that made no specific reference to conduct occurring abroad.[29] As we have seen, this Court held in 1909 that the general terms of the Sherman Act would be construed as being "confined in [their] operation and effect to the territorial limits over which the lawmaker has general and legitimate power." *American Banana*, 213 U.S. at 357. But this Court has since flatly overruled *American Banana*,[30] and it has repeatedly held that the antitrust laws *do* apply to conduct occurring wholly outside the United States.[31]

Like the antitrust laws, the Lanham Act contains broad jurisdictional language that does not make specific reference to conduct occurring abroad. Nonetheless, this Court held in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), that the Lanham Act applied extraterritorially to conduct by a U.S. national that had effects within the United States. The Court emphasized that "the United States is not debarred by any rule of international law from governing the conduct of its own citizens . . . in foreign countries

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[29] *See* 15 U.S.C. § 1 ("restraint of trade or commerce . . . with foreign nations"); 15 U.S.C. § 2 ("monopolize . . . commerce . . . with foreign nations").

[30] Justice Scalia just last Term characterized *American Banana* as having been "substantially overruled" by *Continental Ore. W.S. Kirkpatrick v. Environmental Tectonics Corp.*, 110 S. Ct. 701, 705 (1990).

[31] *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 705 (1962); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 275-76 (1927). Likewise, this Court has repeatedly cited with approval the Second Circuit's seminal decision in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), holding that the Sherman Act applies to conduct aboard that has effects within the United States. *See Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 704-05 (1962); *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288 n.16 (1952); *Zenith Radio Corp. v. Hazeltine Research Corp.*, 395 U.S. 100, 114 n.8 (1969). *Accord* Restatement (Third) Foreign Relations Law § 415 (1987); U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations* 29-34 (1988).

when the rights of other nations or their nationals are not infringed." *Id.* at 285-86.

Similarly, the pretrial discovery provisions of the Federal Rules of Civil Procedure do not specifically authorize discovery of documents or other materials located outside the United States. But this Court has held squarely that the Federal Rules do authorize extraterritorial discovery; indeed, even where U.S. discovery would require violating foreign secrecy or nondisclosure laws, discovery may be ordered.[32]

Likewise, the geographic scope of the federal securities laws are couched in general terms that Congress did not specifically extend to conduct occurring in foreign states.[33] Nonetheless, it is well-established that the securities laws are applicable extraterritorially to foreign conduct. Section 416 of the Restatement (Third) Foreign Relations Law specifically provides for such a result, and comment a to that section explains that "[t]he reach and application of securities legislation of the United States depend on their reasonableness," and not upon strict notions of territoriality.[34] And finally, numerous lower courts have ap-

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[32] *Societe Internationale Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197 (1958); *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987). *See* Restatement (Third) Foreign Relations Law § 442 (1987).

[33] 15 U.S.C. § 77b(7) ("The term 'interstate commerce' means trade or commerce in securities . . . among . . . or between any foreign country and any State, Territory, or the District of Columbia").

[34] Restatement (Third) Foreign Relations Law § 416, comment a (1977). Dozens of lower court decisions have applied the securities laws extraterritorially. *E.g., Tamari v. Bache & Co. (Lebanon)*, 730 F.2d 1103 (7th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041 (2d Cir. 1983); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27 (D.C. Cir. 1987); *Grunenthal GmbH v. Hotz*, 712 F.2d 421, 425 (9th Cir. 1983).

plied generally worded federal narcotics and other criminal statutes extraterritorially.[35]

Based on these and other decisions, the recent Restatement (Third) Foreign Relations Law specifically *deleted* a section of the earlier Restatement (Second) Foreign Relations Law providing that federal statutes were presumed to be applicable only within U.S. territory. Section 38 of the Second Restatement provided that "[r]ules of United States statutory law . . . apply only to conduct occurring within, or having effect within, the territory of the United States, unless the contrary is clearly indicated by the statute." The Third Restatement omitted this section, recognizing that this Court's recent decisions, and the evolution of public international law rules, no longer support any such presumption.[36]

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[35] *E.g., United States v. Wright-Barker*, 784 F.2d 161 (3d Cir. 1986); *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980); *United States v. Brown*, 549 F.2d 954 (4th Cir. 1977).

[36] Respondent has suggested that the Third Restatement preserves the territoriality presumption contained in § 38 of the Second Restatement. Cert. Opp. at 5 n.5. The overwhelming weight of the evidence is to the contrary. *See* Restatement (Third) Foreign Relations Law § 402, comment i (1987) ("statutes should, where fairly possible, be interpreted consistently with this section and § 403"); *id.* § 403, comment a.

This Court's decisions in *McCulloch* and *Benz* do not support the lower court's presumption of territoriality in cases involving U.S. parties. The issue in those cases was whether the U.S. statutes in question applied to *alien* workers. That issue is simply irrelevant here. As discussed above, the alien exclusion of Title VII distinguishes between citizen and alien labor, and makes plain that the Act does not protect aliens outside the United States. 42 U.S.C. 2000e-1. Where application of the NLRA to *U.S.* workers is involved, this Court has not followed *McCulloch* and *Benz*. *See Int'l Longshoremen's Assn., Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970); *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987). Similarly, in *Foley Bros.* 336 U.S. at 286, the Court's rationale was premised in large part upon the fact that if the statute at issue were interpreted to apply outside the U.S., it (unlike Title VII) would have applied there to aliens as well as U.S. citizens.

B. Rather Than Applying Any Rigid Presumption of Territoriality, This Court Has Repeatedly Held That The Reach of Ambiguous Federal Statutes Is Determined by Reference to International Choice-of-Law Principles

Rather than reflecting an archaic presumption of strict territoriality, this Court's construction of the geographic scope of federal statutes has been based upon a more natural, common sense analysis. This Court has repeatedly concluded that Congress legislates against the background of public international law and choice-of-law rules. These rules have provided a flexible, finely-tuned basis for determining the geographic scope of federal statutes.[37]

In *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court considered the geographic reach of the Jones Act's broad grant of relief to "[a]ny seaman who shall suffer personal injury in the course of his employment . . ." 46 U.S.C. App. § 688(a). The Court refused to apply either a strict territorial presumption or a blindly literal reading of this formula. Instead, the Court held that the Jones Act was passed against a background of maritime choice-of-law rules and international law principles that sought to "reconcil[e] our own with foreign interests and . . . accommodat[e] the reach of our own laws to those of other maritime nations." 345 U.S. at 577. And these choice-of-law rules called upon the Court to identify the "connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority."[38] Applying these factors, the Court held that

[37] By contrast, respondent's rigid territoriality rule would have bizarre results. A U.S. employee, dispatched abroad on a short business trip, could be terminated on the basis of race or gender during his or her travels and Title VII would not apply. Congress simply could not have intended to permit this.

[38] 345 U.S. at 582. The court identified several "choice of law" considerations relevant to this analysis: the place of the wrongful act; the law of the flag; the allegiance or domicile of the injured; the allegiance of the defendant shipowner; the place of the contract; the inaccessibility of any foreign forum; and the law of the forum state. *Id.* at 583-93.

the Jones Act did not apply to a Danish seaman injured on board a Danish ship, while that ship was anchored in Havana, Cuba.[39]

Similarly, in *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), the Court looked to a range of different considerations—identical to those factors relevant to choice-of-law analysis—in holding the Lanham Act applicable extraterritorially to unlawful conduct in Mexico. Among other things, the Court emphasized that the defendant was a U.S. national and resident, *id.* at 284-85; that the plaintiff was a U.S. corporation, *id.* at 281; that the allegedly unlawful conduct had some effects within the United States; *id.* at 286 and 288; and that no direct conflict between U.S. and Mexican law was presented, *id.* at 289. Based on similar choice-of-law analyses, subsequent lower court decisions involving allegedly unlawful conduct by *aliens* outside of the United States have generally been held beyond the reach of the Lanham Act.[40]

[39] Likewise, in *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 383 (1959), this Court again interpreted the Jones Act (and general maritime law) in light of "principles of choice-of-law." The Court held that the Jones Act provided no remedy for a foreign seaman, injured on a foreign vessel owned by a foreign national, even though the plaintiff's injury occurred in U.S. territorial waters: "The amount and type of recovery which a foreign seaman may receive from his foreign employer while sailing on a foreign ship should not depend on the wholly fortuitous circumstance of the place of injury." *Id.* at 384. The result in cases involving U.S. seamen or more extensive U.S. contacts is very different. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (applying *Lauritzen* analysis to find that Jones Act does provide remedy to alien seaman on foreign-flagged vessel with greater U.S. contacts); *Symonette Shipyards, Ltd. v. Clark*, 365 F.2d 464 (5th Cir. 1966) (Jones Act applies to U.S. seamen aboard foreign-flagged vessel on high seas); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir. 1959).

[40] *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956); *Vespa of America Corp. v. Bajaj*

This Court's recent decision in *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522 (1987) is to the same effect. There, the Court adopted a comity-based choice-of-law analysis in order to determine when direct extraterritorial discovery under the Federal Rules of Civil Procedure would be ordered. This analysis required a "particularized analysis of the respective interests of the foreign nation and the requesting nation," together with other choice of law considerations. *Id.* at 543-44.

Finally, in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945), the Court of Appeals, sitting by Supreme Court certificate as the court of last resort, applied the same general choice-of-law analysis to the federal antitrust laws. The court held that it ought not "read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'conflict of laws.'" *Id.* at 443. This Court has specifically endorsed *Alcoa*,[41] and more recent lower court decisions have adopted an even more explicit choice-of-law approach to the extraterritorial effect of the antitrust laws.[42]

Auto Ltd, 550 F. Supp. 224, 227-28 (N.D. Cal. 1982). *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 426-29 (9th Cir. 1977); *Ramirez & Feraud Chili Co. v. Las Palmas Food Co.*, 146 F. Supp. 594, 601-02 (S.D. Cal. 1956), *aff'd*, 245 F.2d 874 (9th Cir. 1957).

[41] *See* note 31 *supra*.

[42] *E.g., Timberlane Lumber Co. v. Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976) *aff'd*, 749 F.2d 1378 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); *Montreal Trading Ltd. v. Amax Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979). *See also* U.S. Dep't of Justice *Antitrust Enforcement Guidelines for International Operations* 31-34 (1988).

Based upon these decisions, the Third Restatement replaced strict principles of territoriality with an analysis based upon choice-of-law principles and less archaic notions of public international law. As described above, § 402 of the Third Restatement recognizes a wide range of acceptable jurisdictional bases under international law—of which territoriality is only one. Section 403 then sets forth a "rule of reason" based upon choice-of-law considerations like those set forth in *Lauritzen*, *Bulova*, *Aerospatiale* and *Alcoa*: it provides that "a state may not exercise jurisdiction to prescribe law . . . when the exercise of such jurisdiction is unreasonable." And "reasonableness" is determined by evaluating a range of considerations, derived from this Court's decisions, that are set forth in § 403(2).[43]

III. UNDER INTERNATIONAL CHOICE-OF-LAW PRINCIPLES, TITLE VII APPLIES TO EMPLOYMENT DISCRIMINATION OUTSIDE THE UNITED STATES BY A U.S. COMPANY AGAINST A U.S. CITIZEN

Under the choice-of-law considerations set forth in this Court's decisions and § 403, it is plain that Title VII applies to respondents' conduct. First, respondents are Delaware corporations and U.S. nationals. Nationality—in and of itself—is well recognized as a legitimate basis for the assertion of extraterritorial jurisdiction.[44] And,

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[43] These considerations include the expectations and nationality of the parties subject to regulation; the domestic effects of the activity in question; the importance of the regulation to the regulating state; the degree of international consensus on the norms reflected in the regulation; and possible conflicts with the laws of other states. *See* Restatement (Third) Foreign Relations Law § 403(2) (1987).

[44] *See Skiriotes v. Florida*, 313 U.S. 69, 74 (1941) ("the United States is not debarred by any rule of international law from governing the conduct of its citizens upon the high seas or even in foreign countries when the rights of other nations or their na-

as we have already shown, this Court has repeatedly relied upon the defendant's U.S. nationality in determining the reach of U.S. statutes in international cases.[45]

This case also involves the application of U.S. law to protect a U.S. national from unlawful employment discrimination. This Court has often recognized the legitimate interest of states in the protection of their citizens,[46] and well-established choice-of-law principles give substantial weight to the nationality of the injured plaintiff.[47] This factor becomes even more compelling when the defendant is of the same nationality as the plaintiff, which is the case here.[48]

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tionals are not infringed"); *Blackmer v. United States*, 284 U.S. 421, 437 (1932); *Cook v. Tait*, 265 U.S. 47, 56 (1924).

Scores of federal laws apply specifically to the conduct of U.S. nationals, both at home and abroad. In general, federal laws apply extraterritorially to U.S. nationals when they concern matters of vital national importance—like racial discrimination. *E.g.*, 50 U.S.C. App. § 451 (1988) (selective service); *Cook v. Tait*, 265 U.S. 47 (1924) (taxation); *United States v. Bowman*, 260 U.S. 94 (1922) (fraud against United States); Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd (corrupt business practices). Moreover, given that U.S. nationals working abroad are subject to these U.S. legal obligations, it is only natural that Congress would have intended that they enjoy certain basic U.S. legal protections.

[45] *Lauritzen*, 346 U.S. at 587; *Bulova*, 344 U.S. at 285-86; *Bowman*, 260 U.S. at 102.

[46] *Compare McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957) (California has a "manifest interest in providing effective means of redress for its residents" against out-of-state defendant) *with Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) ("Because the plaintiff is not a California resident, California's legitimate interests in the dispute have considerably diminished").

[47] *See Lauritzen*, 345 U.S. at 586 (assigning substantial weight to "allegiance or domicile of the injured"); Restatement (Third) Foreign Relations Law § 403(2)(b) (1987); Restatement (Second) Conflict of Laws § 145 (1971).

[48] *See* Restatement (Second) Conflict of Laws § 145, comment e illustration 1; *Babcock v. Jackson*, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963) (New York law applicable to accident in Canada involving two New York citizens).

Moreover, discrimination against U.S. citizens abroad by U.S. employers will have significant effects at home. More than two million U.S. citizens work outside of the United States, and many times this number travel abroad on business.[49] Successful performance in overseas assignments is often essential to career development at major firms. U.S. employees who are denied this path to advancement because of employment discrimination will be foreclosed, right here in the United States, from rising to positions of responsibility.[50] More fundamentally, violations of Title VII simply cannot be measured in the way that we calculate the effects of unfair trade practices. Civil rights are not commodities. When a U.S. company can tell a U.S. citizen abroad that he or she has been fired just because he is black or she is a woman, the moral imperative of Title VII is compromised. Tolerating such conduct conveys an insidious message to other Americans in the company (here and abroad) and to foreigners.

Of equal significance under this Court's international precedents is the importance that Congress attached to a particular statutory protection.[51] As we have already

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[49] *The World Almanac and Book of Facts: 1990* 555 (1989). *See* n.25 *supra*.

[50] Moreover, when a U.S. citizen is fired from an overseas position with a U.S. company he or she can ordinarily be expected to return to this country—and its unemployment compensation system. For the same reason, it is only natural that U.S. employees will seek legal recourse against Title VII violations abroad after they return to the United States. Maintaining an action abroad would require dealing from afar with foreign counsel, foreign procedures, laws and tribunals, and perhaps a foreign language—in a proceeding against a fellow American.

[51] *Societe Internationale*, 357 U.S. at 204-06; *Societe Nationale*, 482 U.S. at 540-41. Section 403(2)(c) of the Third Restatement also makes clear that substantial weight is to be accorded to the importance Congress has attached to particular law or public policy.

shown, Title VII embodies a national commitment of the most elemental and paramount importance. Moreover, the norms of Title VII are not only American values: they reflect the highest aspirations of the international community.[52] Discrimination on the basis of race or religion in employment is prohibited by international convention,[53] and as respondents concede, it is proscribed by the domestic laws of many countries.

Finally, this case does not involve any conflict between U.S. foreign laws or policies. As respondents concede, Saudi law—like Title VII—forbids employment discrimination.[54] Moreover, because Title VII only applies to discrimination against U.S. nationals, the likelihood of conflict with the laws of other nations is significantly diminished (precisely as Congress intended).[55]

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[52] Section 403(2)(e) and (f) of the Third Restatement demonstrate that the universal importance and acceptance of Title VII's basic precepts weighs in favor of extraterritorial application of the statute.

[53] *See, e.g.*, Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/4354 (1965); Convention on the Elimination of All Forms of Discrimination Against Women, art. 11(1)(b), (c), G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 195, U.N. Doc. A/34/46 (1979); Convention Concerning Discrimination in Respect of Employment and Occupation, June 25, 1958, 362 U.N.T.S. 31.

[54] *Lauritzen*, 345 U.S. at 575, 582 (emphasizing significance of actual conflict between U.S. and foreign law); *Bulova*, 344 U.S. at 289. Respondents suggest that the existence of Saudi antidiscrimination laws itself creates a conflict with U.S. law. This confuses the existence of a *conflict* in national laws with the existence of *concurrent jurisdiction* by two nations over the same conduct. Concurrent jurisdiction is relatively common in the international legal system, by virtue of the increasingly normal practice of extraterriorial regulation. *See* Restatement (Third) Foreign Relations Law § 403, comment d (1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922 (D.C. Cir 1984).

[55] *United States v. Bowman*, 260 U.S. at 102; *Timberlane*, 549 F.2d at 612 ("applying American laws to American citizens raises fewer problems than application to foreigners").

There could, of course, be future cases in which a direct conflict between Title VII and a foreign law might exist. Foreign law might, for example, prohibit employing certain classes of persons in specific jobs, or it might encourage or require U.S. companies to hire certain categories of persons (*e.g.*, local nationals).[56] If and when cases involving legitimate conflicts arise, the Court will have the opportunity to determine how they should be resolved. We note here only that there are ample means for deciding such conflicts in a far more measured and precise way than simply declaring Title VII inapplicable to U.S. citizens whenever they go abroad. Some foreign laws might, in appropriate cases, provide the basis for a "bona fide occupational qualification," although the Lawyers' Committee believes that this defense should be applied sparingly. As described above, this Court and the lower courts have also properly considered the degree of conflict between U.S. and foreign laws in determining the extraterritorial reach of various federal statutes.[57] And in some cases, the Act of State doctrine or principles of foreign sovereign compulsion might be relevant.[58] But resolution of these issues should await concrete, live disputes where they may receive the "particularized analysis" that this Court has required in comparable matters.[59]

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[56] *Compare Kern v. Dynalectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984) (Saudi law prohibited non-Muslims from entering the holy area of Mecca) *with Fernandez v. Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981).

[57] *See* pp. 22-25 *supra*.

[58] *Compare Societe International Pour Participations Industrielles et Commerciales S.A. v. Rogers*, 357 U.S. 197 (1958) (U.S. court may order discovery of materials located in Switzerland under U.S. law notwithstanding the fact that Swiss law criminally punishes disclosure of material) *with Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970) (U.S. antitrust laws not applicable to conduct in Venezuela that was compelled by Venezuelan law).

[59] *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 543 (1987).

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

Respectfully submitted,

GARY B. BORN
Counsel of Record
W. HARDY CALLCOTT
MICHAEL C. SMALL
ELIZABETH KIINGI
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

ROBERT F. MULLEN
Co-Chairman
DAVID S. TATEL
Co-Chairman
NORMAN REDLICH
Trustee
BARBARA R. ARNWINE
THOMAS J. HENDERSON
RICHARD T. SEYMOUR
Lawyers' Committee for Civil
Rights Under Law
1400 Eye Street, N.W.
Washington, D.C. 20005
(202) 371-1212

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